

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
**HON. BERNARD J. FRIED** Justice

**E-FILE**

PART 60

NATALIA ERMAKOVA, et al.,  
Plaintiffs,

INDEX NO. 651208/2011

- v -

MOTION DATE \_\_\_\_\_

TATIANA BACKMAN, et al.,  
Defendants.

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

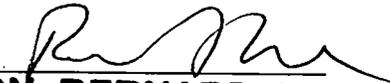
Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This motion is decided in accordance with the attached Memorandum Decision. The parties are directed to pick up the trial exhibits from Part 60, Room 248, within 10 days of the date of this Order. If they are not retrieved in that time, they will be destroyed.

SO ORDERED.

Dated: 10/5/2011

  
**HON. BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

----- X

NATALIA ERMAKOVA and  
TLI TRANSPORT LOGISTIC INTERNATIONAL, INC.,

Plaintiffs,

- against -

Index No.  
651208/2011

TATIANA BACKMAN, individually and in her capacity  
as Trustee of the Chado Trust, NORA PINES, in her capacity  
as Trustee of the Chado Trust, CHADO TRUST,  
MIKHAIL KURNEV, ZIMCO HOLDINGS, LLC and  
ZIMCO CAPITAL, LLC,

Defendants.

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**APPEARANCES:**

For the Plaintiffs:

LAW OFFICE OF TEDD KESSLER, P.C.  
302 Fifth Avenue, 8<sup>th</sup> Floor  
New York, NY 10001

RHEEM, BELL & MERMELSTEIN LLP  
302 Fifth Avenue, 8<sup>th</sup> Floor  
New York, NY 10001  
By: Edward Mermelstein, Esq.

For Defendants Backman,  
Kurnev, Zimco Holdings LLC  
and Zimco Capital LLC:

WOLLMUTH MAKER &  
DEUTSCH LLP  
500 Fifth Avenue, 12<sup>th</sup> Floor  
New York, NY 10110  
By: Randall Rainer, Esq.

**Fried, J.:**

Plaintiff, Natalia Ermakova (“Ermakova”) moves for a preliminary injunction that would prevent Defendant, Tatiana Backman (“Backman”) from transferring or dissipating

the funds received from the sale of any assets of Zimco Holdings, LLC (“Zimco Holdings”). A hearing was held on July 26 and 27, 2011, at which Ermakova, Backman, and another defendant, Mikhail Zurnev, testified. Two non-parties, Alexander Spiegel and Michael Stoll, also gave testimony.

Although familiarity with both the procedural and factual background of this matter is presumed, a brief summary of the claims asserted and the relief sought by this motion is helpful.

Plaintiff, Ermakova, is a member of the Russian Duma whose business ventures include interests in many international concerns, including co-plaintiff, TLI Transport Logistic International (“TLI”). In this action, Ermakova and TLI assert causes of action against Ermakova’s daughter, Defendant, Backman, as well as Ermakova’s former employee, Zurnev, along with two entities established by Backman, Zimco Holdings and Zimco Capital, LLC (“Zimco Capital”). The other defendants are the Chado Trust, which was a trust formed by Ermakova and Backman, and Nora Pines, the Trustee of the Chado Trust. The causes of action include fraud, conspiracy to commit fraud, breach of contract, breach of fiduciary duty, unjust enrichment, and conversion. Plaintiffs also seek a declaratory judgment that Ermakova is the rightful owner of Zimco Holdings, Zimco Capital and the Chado Trust, and a permanent injunction giving Ermakova control of these entities and preventing Zimco Holdings and Backman from dissipating any monies received in connection with the sale of certain real properties.

All of these claims arise out of the allegedly unauthorized transfer, by Backman, of approximately \$20 million from accounts controlled by Ermakova into accounts controlled

by Backman, or by the Chado Trust. Ermakova further alleges that Backman and Kurnev intentionally mis-translated certain documents and conversations that led to the formation of the Chado Trust. Ermakova alleges that Backman used the transferred funds to make certain, unauthorized, real estate investments on behalf of the Chado Trust, and to pay her personal credit card bills.

By this motion, Plaintiffs seek a preliminary injunction that would prevent Backman from dissipating any monies received in connection with the sale of any of the assets of Zimco Holdings, since, Plaintiffs contend, the monies used to obtain the assets were transferred from Ermakova's accounts without her consent. Plaintiffs assert, in a conclusory manner, that they are likely to succeed on the merits, and they rely almost exclusively on the testimony of Ermakova for evidentiary support. Plaintiffs assert they will be irreparably harmed if the injunctive relief is not granted, because Backman is not financially stable, and thus would have no way of repaying Ermakova if the final judgment is in her favor. Plaintiffs also argue that the equities are in their favor because the funds were transferred without authorization and then used to purchase real estate, which should be in Ermakova's name, but which is instead held by her daughter, Backman.

Defendants contend, however, that Plaintiffs are not likely to succeed on the merits, because Backman did not transfer any funds without her mother's authorization, and further, because Ermakova, a sophisticated and accomplished business woman, had a thorough understanding of the implications of her creation of the Chado Trust. Defendants further contend that there is no irreparable harm because the assertion that Backman is not financially stable is purely speculative and not supported by the evidence, and that the

balance of equities favors Defendants because Ermakova has acted in bad faith by bringing these claims against her daughter.

The provisional relief of a preliminary injunction is intended to preserve the status quo until the matter proceeds to trial and may be heard on the merits. *Morris v. Port Authority of N.Y. and N.J.*, 290 A.D.2d 22, 26 (1st Dep't 2002). Whether to issue such relief is a decision that is left to the discretion of the trial court. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839 (2005). Such a drastic remedy will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers. *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001). To establish such a right, Plaintiff must demonstrate that it is likely to succeed on the merits of the underlying complaint, that it will suffer irreparable injury if the injunctive relief is not granted, and that the balance of the equities tips in its favor. *Doe v. Axelrod*, 73 N.Y.2d 748 (1988); *Bishop v. Rubin*, 228 A.D.2d 222 (1st Dep't 1996). Plaintiff must establish its satisfaction of these three factors with clear and convincing evidence. *See, e.g., Modern Telecommunications, Inc. v. Zimmerman*, 140 A.D.2d 217 (1st Dep't 1988); *see also EdCia Corp. v. McCormack*, 44 A.D.3d 991 (2d Dep't 2007).

I turn, first, to the question of whether Ermakova has demonstrated that she is likely to succeed on the merits. In order to succeed on her claim that Backman does not have any right to the proceeds of the sale of any of the assets of Zimco Holdings, Ermakova must offer convincing evidence to support her assertion that the funds used by Zimco Holdings to purchase the assets were obtained without Ermakova's consent. Plaintiffs must therefore show that Backman was not authorized to transfer funds from the accounts of TLI or of her

mother, into accounts held by Chado Trust and subsequently transferred to Zimco Holdings.

As previously stated, Plaintiffs rely primarily on the testimony of Ermakova to support the contention that they are likely to succeed on the merits of their claims. While the parties did offer some documentary evidence during the course of the proceedings of July 26 and 27, 2011, this is the type of she said/she said situation that turns on the credibility of the parties involved. Therefore, the more compelling evidence took the form of the testimony of the party witnesses, themselves. Although I make no findings, now, with regard to the ultimate issues in this action, I have concluded that Plaintiffs have not demonstrated, by convincing evidence, that they are likely to succeed on the merits of their claim that the funds were wrongfully transferred.

First, there is no dispute that Backman was an authorized signatory on the relevant accounts. The basis for Plaintiffs' contention that Backman had no right to transfer the monies at issue is, first, that, pursuant to an oral agreement between them, Backman was supposed to receive permission from her mother before transferring any funds, and that, prior to making these transfers, such permission was not given. Moreover, Ermakova argues that Backman obtained her position as Trustee of the Chado Trust through fraudulent means, and that if she had not done so, she would not have had the ability to freely transfer funds from one account to another.

However, having heard the testimony of both Backman and Ermakova, as well as Spiegel and Kurnev, I do not find credible Ermakova's assertions that she was somehow tricked into naming Backman as the trustee, nor that she was not the person directing the transfer of funds and assets from one account to another.

Backman testified, credibly, that Ermakova made her a signatory on her TLI accounts shortly after her election to the Duma, and that she received permission before each transfer of funds. (Hr'g Tr., July 26, 2011 at 114-15.) She testified that, with Ermakova's authorization, she wired the funds from a Swiss account to the Chado Trust (*id.* at 125); and that, with her mother's permission, she transferred \$8.1 million to Zimco Holdings from the TLI account, \$2.5 million from an account jointly held by Backman and Ermakova, and another \$2 million from the Chado Trust. (*Id.* at 127-28.)

Similarly, Kurnev testified, credibly, as to Ermakova's close involvement with the various real estate investments he proposed (Hr'g Tr., July 27, 2011 at 169-720), as well as to Ermakova's knowledge, and encouragement of, her daughter's participation in the deals (*id.* at 190). Kurnev also testified that Ermakova intended to use either the Chado Trust or Zimco Holdings as the lending entity in a development project on Frederick Douglas Boulevard (the "Eighth Avenue Project"), and that she intended to use \$22 million in funds from her Swiss account to fund the investment. (*Id.* at 183, 191, 196.) The testimony therefore does not support the conclusion that funds were transferred improperly.

Furthermore, with regard to the allegation that Backman obtained her status as trustee of the Chado Trust in a fraudulent manner, there is ample, credible testimony that Ermakova understood and approved of the arrangement for the Trust's management. Kurnev, for example, testified that, when he learned that Backman was to be both beneficiary and trustee of the Chado Trust, he voiced his concern to Ermakova, and she told him not to worry about it. She said that she had discussed the arrangement with attorneys, and she was happy with it. (Hr'g Tr., July 27, 2011 at 165-66.) Moreover, Michael Stoll, the attorney who advised

Ermakova and Backman on the creation of the Chado Trust, testified that he discussed with Ermakova, through Backman as interpreter, that Backman would be in control of investment decisions and the independent trustee, Nora Pines, would control distributional decisions.

(*Id.*) Stoll testified that Ermakova declined an offer for a copy of the Trust agreement in Russian, and that Ermakova did not request any interpreter other than Backman. (*Id.* at 246-47, 249.)

In addition to this testimony, which rebuts Ermakova's contention that she never intended for her daughter to have control over the Chado Trust and its investments, there was also credible testimony which contradicted Ermakova's assertions that the funds and assets held by the Trust were not intended to benefit Backman. In addition to Backman's testimony that Ermakova used the Chado Trust to purchase, as a gift for her daughter, an apartment located at 27 West 72<sup>nd</sup> Street in New York City, both Kurnev and Backman testified, credibly, that Ermakova was interested in structuring the purchase of this apartment in such a way as to minimize tax implications, and specifically, to avoid paying gift tax. (*See* Hr'g Tr., July 26, 2011 at 116-18, 150-56.) Moreover, Stoll testified that he understood that the purpose of the Chado Trust was to provide "trust tax and nontax benefits that would not have been obtained had [Ermakova] continued to make *gifts* outright to [Backman]." (*Id.* at 245, emphasis added.)

In short, although Ermakova testified that she did not authorize the transfer of funds from her TLI and other accounts, that she did not authorize the investments made by Zimco Holdings, and that she was defrauded into creating the Chado Trust, the majority of the credible testimony adduced during the hearing belies her account of what transpired.

Moreover, given Ermakova's substantial business acumen and extensive education, I am hard-pressed to credit her testimony that she did not understand the terms of the Trust. I also do not credit her assertions that Backman failed to honor the purported oral agreement they had in place. Ermakova's testimony and presence on the witness stand leads only to the conclusion that she had a powerful hand – and a cognizant mind – in the establishment of the Chado Trust, and in all of the other financial dealings with which Backman, Kurnev and the two Zimco entities were involved. In the absence of any compelling evidence that Backman acted in any way that exceeded her authority with regard to the Trust or the accounts on which she was a signatory, I cannot conclude that Ermakova has demonstrated a likelihood of success on the merits of her claims.

Since she has not satisfied the first prong of the well-known three-part test for preliminary injunctive relief, a detailed discussion of the other two prongs is not necessary. *See, e.g., Doe v. Axelrod*, 73 N.Y.2d 748, 750-51 (1988) (concluding that a preliminary injunction was improper where plaintiff failed to satisfy the first prong of the test).

Nonetheless, I also note that the only basis asserted for irreparable harm is the possibility that Backman may become insolvent and be unable to satisfy any judgment against her. However, it is well-settled that any loss that would be compensable by money damages does not give rise to the type of irreparable harm required for a preliminary injunction to issue. *See, e.g., Credit Index, L.L.C. v. Riskwise International L.L.C.*, 282 A.D.2d 246, 247 (1st Dep't 2001). Moreover, Backman testified, credibly, that she receives \$3200 in rental income each month, and that her expenses are only around \$2500 per month. (Hr'g Tr., July 26, 2011 at 131.) She also testified that she has about \$100,000 in savings.

(Hr'g Tr., July 27, 2011 at 266.) Plaintiff's contention that Backman's insolvency is imminent is therefore mere speculation, with no evidentiary support. As such, it does not give rise to a conclusion that Ermakova has satisfied the second prong of the three-part test. *See Valentine v. Schembri*, 212 A.D.2d 371, 372 (1st Dep't 1995) (award of preliminary injunction reversed, in part, because the irreparable harm that was alleged was "speculative and not supported by the record").

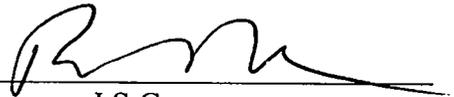
Finally, with regard to the balance of the equities, since Ermakova has not demonstrated that Backman acted outside the scope of her authority, I cannot conclude that the equities lie in Ermakova's favor.

Accordingly, it is

ORDERED that Plaintiff's application for a preliminary injunction is DENIED.

Dated: October 5, 2011

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**